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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/661,292	09/12/2003	Harrison Robert Murphy	2138.001B	7437

23405 7590 03/15/2006

HESLIN ROTHENBERG FARLEY & MESITI PC
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ALBANY, NY 12203

EXAMINER

CONLEY, FREDRICK C

ART UNIT PAPER NUMBER

3673

DATE MAILED: 03/15/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No. 10/661,292	Applicant(s) MURPHY ET AL.	
	Examiner FREDRICK C. CONLEY	Art Unit 3673	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 06 December 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 3,21-26,28-30 and 33-41 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 3,21-26,28-30 and 33-41 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 12/06/05 has been entered.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 3, 21-26, 28-30, 33-35, 37-38, 40-41 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-13 and 19-30 of U.S. Patent No. 6,823,548. Although the conflicting claims are not identical, they are not patentably distinct from each other because the claims require a flame-retardant composite fire barrier textile comprising two distinct fabric layers, a thermally insulating fabric layer and a fire barrier fabric layer, said thermally insulating fabric layer and said fire barrier fabric layer independently comprising at least one char-forming flame retardant fiber.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 3, 21-26, 28-30, and 33-41 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Pat. No. 6,718,583 to Diaz in view of U.S. Pat. No. 4,794,037 to Hosoda et al.

Claims 3, 28-30, Diaz discloses an open flame resistant mattress comprising a fire barrier textile at least partially enclosing a core of said mattress, said fire barrier textile comprising two distinct fabric layers: (1) a fire barrier fabric layer 20 and (2) a thermally insulating fabric layer 14, said fire barrier fabric layer comprising at least one char-forming flame-retardant fiber, such as an aramid fiber (col. 3 lines 34-49). Diaz fails to disclose the thermally insulating layer having one char-forming flame retardant fiber. Hosoda discloses a fabric having at least one char-forming flame retardant fiber, such as flame retardant viscose fibers (col. 2 lines 43-55). It would have been obvious for one having ordinary skill in the art at the time of the invention to employ a flame retardant fiber as taught by Hosoda (col. 2 lines 43-45) in order to impart a high level of flame proofness to the thermally insulating layer of Diaz.

Claims 36-41, Diaz, as modified, discloses all of the Applicant's claimed limitations except for the mattress meeting the smoldering resistance standard, resisting an open flame under conditions of California TB 117, and California TB 603, wherein

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the mattress has a maximum heat release of less than 200 kW and a total energy release of less than 25 MJ in the first ten minutes of the test. It would have been obvious for one having ordinary skill in the art at the time of the invention to have the mattress resist an open flame under conditions as stated above in order for the mattress of Diaz to meet the standards for institutional mattresses sold in the State of California.

Claims 21-25 and 33-35, Diaz discloses an open flame resistant mattress comprising a fire barrier textile at least partially enclosing a core of said mattress, said fire barrier textile comprising two distinct fabric layers: (1) a fire barrier fabric layer 20 and (2) a thermally insulating fabric layer 14, said fire barrier fabric layer comprising at least one char-forming flame-retardant fiber, such as an aramid fiber (col. 3 lines 34-49). Diaz fails to disclose the thermally insulating layer having one char-forming flame retardant fiber. Hosoda discloses a fabric having at least one char-forming flame retardant fiber, such as flame retardant viscose fibers (col. 2 lines 43-55). It would have been obvious for one having ordinary skill in the art at the time of the invention to employ a flame retardant fiber as taught by Hosoda (col. 2 lines 43-45) in order to impart a high level of flame proofness to the thermally insulating layer of Diaz. Diaz fails to disclose the mattress resisting an open flame under conditions of California TB 117. It would have been obvious for one having ordinary skill in the art at the time of the invention to have the mattress resist an open flame under conditions as stated above in order for the mattress of Diaz to meet the standards for institutional mattresses sold in the State of California.

With regards to claim 26, Diaz, as modified, discloses all of the Applicant's claimed limitations wherein the thermally insulating fabric layer comprises a blend of flame retardant viscous and other fibers (Hosoda)(col. 2 lines 43-55). Diaz fails to disclose employing modacrylic fibers. It is considered obvious to choose from a plethora of known materials for use in bedding and it would have been obvious for one having ordinary skill in the art at the time of the invention to employ a modacrylic fiber in order to provide the blended fiber product as taught by Hsoda (col. 2 lines 48-50).

Response to Arguments

Applicant's arguments with respect to claims 3, 21-26, 28-30, and 33-41 have been considered but are moot in view of the new ground(s) of rejection.

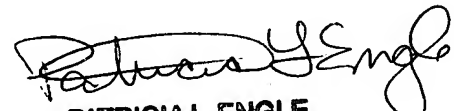
Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to FREDRICK C. CONLEY whose telephone number is 571-272-7040. The examiner can normally be reached on M-TH.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, PATRICIA L. ENGLE can be reached on 571-272-6660. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

FC



PATRICIA L. ENGLE
PRIMARY EXAMINER